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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1225~~ 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY,

Petitioners,

—v.—

RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE, and ORVILLE L. FREEMAN, Secretary of The United States Department of Agriculture,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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—v.—

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Central Louisiana Electric Company, Inc., Louisiana Power & Light Company and Gulf States Utilities Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 13, 1966.

OPINIONS BELOW

The opinion of the district court is in the record* (R. 388-409) and is reported at 236 F. Supp. 271 (W. D. La. 1964). Its preliminary injunction, including findings of fact and conclusions of law, is in the record. (R. 410-420). The opinion of the court of appeals is in the record (R. 434-453) and reported at 354 F.2d 859 and is appended hereto with its judgment (R. 454) and order denying petitioners' motion for rehearing (R. 469). (Appendix B, *infra*, p. 34).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966. (R. 454). Application for rehearing was filed on January 28, 1966 (R. 455), and rehearing was denied on February 7, 1966. (R. 469). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the Administrator of the Rural Electrification Administration bound to comply with a regulation prescribed by him, which limits his discretion to grant loans under Section 4 of the Rural Electrification Act, and are those directly and adversely affected by its arbitrary and capricious violation entitled to judicial review in federal court?

2. Do petitioners have the right of judicial review in federal court to review the granting of a loan by the Administrator to a competitor "regardless of how outrageous or unfair the making of this loan may seem," when:

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* Nine additional copies of the record, as printed for the use of the court below, are filed herewith.

A. An applicable state statute, which provides that an electric public utility may not be deprived of customers without a showing of public necessity, will be violated by consummation of the loan;

B. Substantial customers of petitioners are required to enter into thirty-five year exclusive dealing contracts with the borrower as a condition to the loan;

C. The Administrator, motivated by a desire to harm petitioners, exercised coercion against petitioners to enter into illegal exclusive territorial service arrangements and the loan was granted on the basis of petitioners' refusal to do so and as a part of a conspiracy to harm petitioners; and

D. The loan cannot be justified under the stated objects and purposes of the Rural Electrification Act?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution. The statutes involved are §§ 4 and 13 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. 904, 913; § 10 of the Administrative Procedure Act, 5 U.S.C. 1009; § 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. 1; § 3 of the Clayton Act, 15 U.S.C. 14; Article 6, § 4 and Article 19, § 14, as amended, Louisiana Constitution of 1921; La. R.S. 45:121, 123; La. R.S. 51:122-124. The regulation involved is REA Bulletin 111-3, 29 Fed. Reg. 2765 (1964). They are printed at Appendix A, *infra*, p. 19.

STATEMENT OF THE CASE

1. Jurisdiction in the District Court

On September 30, 1964, this action was filed in the district court by Central Louisiana Electric Company, Inc. (CLECO) against the Rural Electrification Administration (REA), its Administrator, the United States Department of Agriculture and its Secretary. The matter in controversy exceeds $10,000 in value, and the case arises under the Constitution and laws of the United States. Jurisdiction of the district court was invoked under 28 U.S.C. 1331 and 28 U.S.C. 1361. (R. 1, 28).

2. Proceedings in the Courts Below and Facts Material to the Questions Presented

CLECO sought a preliminary and permanent injunction to enjoin the consummation of a loan which was approved by the Administrator in favor of Louisiana Electric Cooperative, Inc. (LEC) in the amount of $56,521,000 to be used in the construction of electric generation and transmission facilities in Louisiana and Arkansas. Louisiana Power & Light Company and Gulf States Utilities Company were granted leave to intervene.

LEC was organized under the Louisiana electric cooperative law by twelve of the thirteen Louisiana electric distribution cooperatives. (R. 1, 2, 3). It has no facilities or customers and was created for the sole purpose of generating electricity and transmitting it to its member cooperatives which generate no electricity and which now purchase approximately ninety-four percent of their electric energy requirements from petitioners. (R. 1, 9, 233). The loan sought

to be enjoined would be used to finance the construction of the facilities necessary to accomplish this purpose (R. 1, 3), which would render valueless many of the facilities dedicated by petitioners to serving the member cooperatives.

Prior to the approval of the loan and at the direction of the appropriations committees of Congress, the Administrator published REA Bulletin 111-3 in the Federal Register. It provided that in considering loans for generation and transmission purposes, REA would make a survey and determine wherein existing or proposed contracts for power from private suppliers were unreasonable, advise the suppliers wherein such contracts were unreasonable, and attempt to get such contracts modified to make them reasonable, and that such loans would not be granted unless this procedure failed to yield reasonable contracts. Thereafter, the Administrator represented to the committees that their directives had been followed. The committees noted the Administrator's compliance with their directives by issuing the regulation, and it was noted that a duty had been imposed on the Administrator in favor of REA borrowers and their suppliers.*

The Administrator informed petitioners that the loan to LEC would be granted unless their proposals to its member cooperatives met certain requirements, including a recognition of the "territorial integrity" of the cooperatives, i.e., recognition of the exclusive right of cooperatives to serve all electric loads in their service areas, including the right to serve areas annexed to municipalities in which they did not have franchises. (Exhibit P, R. 234, 235-237).

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* The directives and declarations of the congressional committees and the representations of the Administrator are set forth for the convenience of the Court at Appendix C, *infra*, p. 53.

Petitioners were invited to supplement or amend existing proposals in light of the Administrator's requirements and were led by the Administrator to believe that REA Bulletin 111-3 would be followed in considering their proposals. (Portion of Exhibit R, R. 245, 246, 247). Thereafter, petitioners submitted contract proposals which were reasonable with regard to price, term and availability and dependability of power and in every respect as to which petitioners could legally contract. (R. 1, 13, 14; 410, 414). The only requirement which petitioners could not meet was that regarding a guarantee of "territorial integrity" of the cooperatives, because it would grant to the cooperatives an area monopoly. Petitioners informed the Administrator that they could not legally make such a guarantee (R. 1, 12), and although the Administrator recognized their inability to do so (portion of Exhibit Y, R. 301, 303; *Hearings before Subcommittee of the Senate Committee on Appropriations on H.R. 11202*, 88th Cong., 2d Sess., Vol. II, p. 160 (1964), printed at Appendix C, infra, p. 53, 60) he insisted that it be made (portions of Exhibit Y, R. 301-303; 311, 312), and he granted the loan solely on the basis of petitioners' inability to satisfy this requirement (Exhibit A, R. 34, 37, 124), certifying to Congress that the loan had been approved in accordance with REA Bulletin 111-3. (Exhibit A, R. 34, 124).

Other allegations forming the basis for the suit may be summarized as follows:

The member cooperatives of LEC, which would be served by it, are now the customers of petitioners, but LEC has not obtained from the Louisiana Public Service Commission a certificate of public convenience and necessity to render service to them, as required by La. R.S. 45:123, and the Adminis-

trator had not required that such be obtained in accordance with 7 U.S.C. 904. (R. 1, 18-20). The Administrator has required, as a condition precedent to consummation of the loan, that the member cooperatives of LEC enter into thirty-five year exclusive dealing contracts with LEC. (R. 1, 23). The Administrator exercised coercion against petitioners in his efforts to extract from them a territorial integrity guarantee which they could not legally make. (R. 1, 14). The loan was not approved for any purpose recognized by 7 U.S.C. 904, in that electricity is already available to over ninety-nine percent of the people in Louisiana (R. 1, 9), but, rather, the Administrator approved the loan as part of a conspiracy which was motivated by a desire to harm petitioners. (R. 1, 16, 26).

The district court granted a preliminary injunction enjoining the consummation of the loan and all actions in furtherance thereof after finding that a prima facie showing had been made that the loan had been approved in violation of REA Bulletin 111-3 in that the Administrator failed to advise petitioners wherein their contract proposals were unreasonable in any respect about which they could legally contract; that there was reasonable cause to believe that petitioners would be subjected to unlawful competition by the consummation of the loan in view of the prohibitions of 7 U.S.C. 904 and La. R.S. 45:123 and the possible antitrust violations alleged; that the Administrator, motivated by a desire to harm petitioners, had engaged in coercion and had participated in a conspiracy against them; and that petitioners would suffer irreparable harm if the loan were consummated. (R. 410-420).

From the granting of the preliminary injunction, respondents appealed to the United States Court of Appeals

for the Fifth Circuit, which reversed the judgment of the district court. (R. 454). Noting the various considerations of public interest involved in the litigation, the court, of its own motion, granted a partial stay of the dissolution of the preliminary injunction so as to restrain the making and disbursement of the loan pending a timely application to this Court for a writ of certiorari. (R. 434, 448, 454).

REASONS FOR GRANTING THE WRIT

1. The holding below conflicts with a principle established by decisions of this Court in *Vitarelli v. Seaton*, 359 U.S. 535; *Service v. Dulles*, 354 U.S. 363; and *Accardi v. Shaughnessy*, 347 U.S. 260, and is in direct conflict with the decision of a district court of another circuit applying those principles to REA Bulletin 111-3.*

The cases decided by this Court held that an administrator is bound to comply with a regulation prescribed by him although it calls for action not otherwise required by statute. In this case, the Administrator's regulation required that he determine wherein petitioners' proposals to their cooperative customers were unreasonable, inform them wherein they were unreasonable and attempt to get them made reasonable, and it provided that no loan would be made unless these procedures failed to yield reasonable contracts. It was alleged and found by the district court that petitioners' proposals were reasonable in every respect as to which they could legally contract.

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* REA Bulletin 111-3 was prescribed after *Kansas City Power & Light Company v. McKay*, 225 F.2d 924 (D. C. Cir. 1955), which was relied on heavily by respondents in the court below and which was cited by that court in support of the result reached by it.

The court below held that petitioners were not entitled to judicial review of the Administrator's arbitrary violation of the regulation by granting the loan solely upon the inability of petitioners to satisfy an admittedly illegal requirement, stating that petitioners were not directly affected by the action. The conflict between that decision and the principles of the decisions of this Court is demonstrated in *Northern States Power Company v. Rural Electrification Administration*, 248 F. Supp. 616 (D. Minn. 1965), which held, in direct conflict with the court below, that REA Bulletin 111-3 constituted a binding regulation and that its violation by the Administrator breached a legal duty to plaintiffs, affording to them the right of judicial review.

Petitioners were directly involved in the procedures required by REA Bulletin 111-3. The consummation of the loan in violation of the regulation will result in the loss of their cooperative customers. To deny that petitioners have the right of judicial review of the violation of REA Bulletin 111-3 is to deny the binding effect of the regulation, contrary to the principles established by this Court.

2. The decision of the court below that the Administrator's violation of REA Bulletin 111-3, as well as the other illegal actions which will be discussed below, does not afford to petitioners the right of judicial review conflicts in principle with *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F.2d 267 (4th Cir. 1965), wherein it was held that under the Administrative Procedure Act (5 U.S.C. 1009), the plaintiff bank had the right of judicial review to prevent the alleged unlawful approval of the establishment of a branch bank, although the National Banking Act does not specifically afford a right of judicial review to an aggrieved party. Peti-

tioners were directly involved in the procedure which led to the approval of the loan by virtue of REA Bulletin 111-3, and under the case cited above, they are entitled to judicial review of a violation of that regulation. The denial of judicial review in this instance raises a serious question of denial of due process.

3. The decision below prohibits judicial review of illegal, arbitrary and unfair administrative action which directly affects petitioners and conflicts in principle with *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), to the effect that an allegation of facts which reveals an absence of legal authority or basic fairness presents a justiciable controversy.

4. The denial of the right of judicial review, notwithstanding the unlawful competition to which petitioners will be subjected by virtue of the Administrator's actions, is contrary to decisions of this Court and other courts of appeals.

In *Alabama Power Company v. Ickes*, 302 U.S. 464, this Court, citing *Frost v. Corporation Commission*, 278 U.S. 515, recognized the right of judicial review to prevent unlawful competition. This rule led to recognition of the right of judicial review in *Whitney National Bank v. National Bank of New Orleans & Trust Company*, 323 F.2d 290 (D.C. Cir. 1963), reversed on other grounds, 379 U.S. 411. See also *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), certiorari denied, 358 U.S. 830. In these bank cases, plaintiffs, whose charters did not provide to them exclusive licenses, were afforded the right of judicial review to enjoin the Comptroller of Currency from issuing a certificate of authority to a national bank to open branch facilities in violation of state law which he was bound to follow under

federal law. In each instance the threat of unlawful competition afforded to plaintiffs the right of judicial review.

The result below under factual circumstances similar to those in the bank cases brings this decision in conflict with those cases and the decisions of this Court regarding the right of judicial review to avoid the threat of unlawful competition. Contrary to the declarations of the court below, petitioners do not claim the exclusive right to serve any territory and their claim to the right of judicial review is not based on such a claim. Their right of judicial review is predicated, in part, on the threat of unlawful competition to which they will be subjected by virtue of specific statutory violations, as in the cases which the court below sought to distinguish.

The Administrator is prohibited from making a loan for generation purposes unless the consent of the State authority having jurisdiction in the premises is first obtained. 7 U.S.C. 904. Louisiana law provides that no electric public utility shall render or extend its electric services or facilities to a customer of another electric public utility without first obtaining from the Louisiana Public Service Commission a certificate of public convenience and necessity. La. R.S. 45:121, 123. While electric cooperatives are subject to the jurisdiction of the Louisiana Commission under Article 6, § 4 of the Louisiana Constitution of 1921, and while respondents admitted that LEC would render service to its member cooperatives which are now customers of petitioners (R. 1, 19; 101, 109), the Administrator certified to Congress that there was no State authority having jurisdiction in the premises, and the certificate required by La. R.S. 45:123 has neither been applied for nor required. (R. 1, 20; 34, 45). Proceedings regard-

ing the violation of La. R.S. 45:123 are pending before the Louisiana Commission. While the district court found it unnecessary to decide the questions now before the Commission, it found that there was reasonable cause to believe that petitioners would be subjected to unlawful competition by the violation of La. R.S. 45:123, which afforded them the right of judicial review. (R. 410, 417).

The threat of unlawful competition is also found in allegations that the effect of the thirty-five year exclusive dealing contracts between LEC and its member cooperatives, which the Administrator has required as a condition to approval of the loan, would be to deprive petitioners of a substantial portion of their market for wholesale power. (R. 1, 23). The district court found that there was reasonable cause to believe that this situation threatened petitioners with direct loss in violation of the antitrust laws of the United States and the State of Louisiana. (R. 410, 418); 15 U.S.C. 1, 14; Article 19, § 14, Louisiana Constitution of 1921; La. R.S. 51:122-124.

5. The decision that petitioners have no right of judicial review conflicts with pronouncements of this Court in view of the allegations of coercion and conspiracy motivated by a desire to harm petitioners.

The district court found in petitioners' allegations and in the preliminary proof submitted in support thereof coercion and conspiracy on the part of the Administrator motivated by a desire to injure or harm and recognized their right of judicial review under *Alabama Power Company v. Ickes, supra*, and *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118.

In *Alabama Power Company v. Ickes, supra*, this Court stated that "If conspiracy or fraud or malice or coercion were involved a different case would be presented" (302 U.S. 464, 479), but on the unquestioned finding of the district court in that case that there was no coercion or conspiracy or any "effort or action motivated by a desire to cause injury or financial loss" (302 U.S. 464, 478), it found that plaintiff did not have the right of judicial review. In *Tennessee Electric Power Company v. T.V.A., supra*, the right of judicial review was denied upon the acceptance of the district court's finding that the defendant had not "indulged in coercion, duress, fraud or misrepresentation * * * ha(d) not acted with any malicious or malevolent motive; and ha(d) not conspired with municipalities or other purchasers of power." (306 U.S. 118, 145).

The court below declared that the gap which was recognized in those cases was filled in *Pennsylvania Railroad Company v. Dillon*, 335 F.2d 292 (D.C. Cir. 1964), certiorari denied, 379 U.S. 945, which involved no allegations of coercion, conspiracy or malice. While the language from the *Alabama* and *Tennessee* cases which is set forth above is dicta, it constitutes a specific reservation by this Court regarding the right of judicial review. The decision of the court below withdraws that reservation.

6. This case presents an important question of federal law which has not been, but should be, decided by this Court.

Independent of all other legal wrongs on which petitioners have predicated their claim to the right of judicial review, petitioners claim that the granting of this loan for no purpose authorized by law denies to them the equal protection of the laws, which has been recognized by this Court to be a right

protected by the Fifth Amendment to the United States Constitution. *Bolling v. Sharpe*, 347 U.S. 497.

7 U.S.C. 904 authorizes loans at interest rates not available to petitioners for the purpose of furnishing electric energy to persons in rural areas who are not receiving central station service. Over ninety-nine percent of the people in Louisiana have electric service available to them. It was alleged that the loan was granted to a direct competitor of petitioners for no legal purpose. Petitioners, therefore, maintain that the loan approval denies to them the equal protection of the laws, which constitutes a legal wrong affording them the right of judicial review.

This issue was not discussed in the *Alabama* case, the forerunner of the cases on the right of judicial review, and while it was raised in the court below, that court did not discuss it. The *Alabama* case denied judicial review on viewing the alleged illegal actions of a federal administrator in the same light as those of a private party. This analogy bears reappraisal in light of the equal protection guarantee which has been found applicable to the actions of federal officials.

7. The decision of the court below that courts do not have jurisdiction to review the granting or denial of loans by the REA conflicts in principle with decisions of this Court and other courts of appeal.

If petitioners have suffered the legal wrongs which they have claimed, the decision below conflicts in principle with this Court's decision in *Harmon v. Brucker*, 355 U.S. 579, wherein it was held that judicial relief is generally available to one who has been injured by an act of a government official which is in excess of his powers.

The court below apparently held that jurisdiction to review an REA loan is lacking because not specifically conferred by Congress. This result conflicts in principle with the rule which recognizes the availability of judicial review to correct a legal wrong so long as such right is not specifically excluded by statute. *Shaughnessy v. Pedreiro*, 349 U.S. 48; *Stark v. Wickard*, 321 U.S. 288; *Gonzalez v. Freeman*, *supra*. See *Heikkila v. Barber*, 345 U.S. 229. The Rural Electrification Act does not preclude judicial review.

The decision below regarding jurisdiction also conflicts in principle with *First National Bank of Smithfield, North Carolina v. Saxon, supra*, which maintained the jurisdiction of the courts to review in the situation set forth above.

8. A review of the questions presented is of vital importance to administrators and the public.

The many conflicts between the decision of the court below and the other decisions mentioned herein should be sufficient to warrant review by this Court. Of greater importance is the effect of the questions presented on federal administrators who must deal with the public, as well as those with whom they must deal, in conducting the affairs of the government. As recognized by this Court, illegal actions of an administrator should not be immune from judicial review when they will result in unlawful competition to a party and when they constitute coercion and conspiracy against a citizen motivated by a desire to harm. However, as bad as such actions may be, they do not constitute the threat to a trusting relationship between administrators and the public which is inherent in the immunity from judicial review afforded by the court below to an administrator who chooses to violate his own regulations in dealing with the public.

Under the decision of the court below, an administrator may invite parties to submit proposals necessary to government projects, represent to them that their proposals will be accepted if certain standards are met, and still be free to reject such proposals arbitrarily with complete immunity from judicial review. Under this result, the public must accept an administrator's representations at face value, but an administrator will be bound by his representations only if he chooses to be. This result will render good faith dealings between administrators and the public virtually impossible.

The Administrator's actions which led to this suit, as well as the actions giving rise to other recent litigation involving the REA, may well have been spawned by a feeling that such actions would not be subjected to judicial scrutiny. The Administrator's alleged violation of his own regulation led to the action pending in the district court in Minnesota and his complete disregard of the statutory limitation regarding the granting of loans for generation purposes without first obtaining the consent of the State authority having jurisdiction in the premises, has led to a Colorado decision which has barred the operation of a $22,000,000 REA financed facility which has already been constructed. *The Western Colorado Power Company v. Public Utilities Commission of the State of Colorado*, 411 P.2d 785 (1966).

In stating that "Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress" (R. 434, 445), the court below has placed the seal of judicial immunity upon all administrative action which directly and adversely affects a party no matter how illegal, unfair, arbitrary and malicious that action may be. The decision reaches the ultimate limits in shielding

administrators from legal action by those whom they have treated unfairly. The court below reached out for this result in spite of findings by the district court that there was prima facie proof of petitioners' allegations. It is apparent that direct legal wrongs which are inflicted upon individuals, as presented here, cannot be righted by Congress. If this statement by the court below is to become the law, its pronouncement should come only after a review of its implications by this Court.

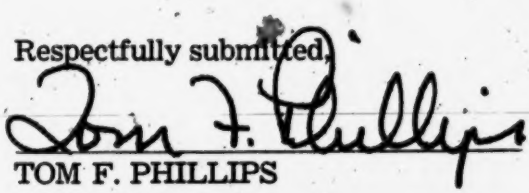
The importance of the public interests involved in this litigation, which will directly affect everyone in Louisiana and which will be of widespread significance throughout the country, led the court below to stay partially its judgment, of its own motion, pending resort to this Court for review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the judgment of the court below should be reversed.

May 1, 1966

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of May, 1966, I served copies of this petition for certiorari on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

Solicitor General of the United States
Department of Justice
Washington 25, D. C.

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Attorney for Respondents in the court below

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Washington 25, D. C.

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APPENDIX A

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECTIONS 4 AND 13 OF THE RURAL ELECTRIFICATION ACT OF 1936, AS AMENDED:

4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipali-

ties for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further*, That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further*, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. May 20,

1936, c. 432, Title I, § 4, 49 Stat. 1365; Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739; Dec. 23, 1944, c. 725, 58 Stat. 925; June 29, 1948, c. 703, 62 Stat. 1070; Oct. 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; June 15, 1955, c. 139, § 2, 69 Stat. 132; 7 U.S.C. 904.

13. As used in this chapter the term "rural area" shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States. May 20, 1936, c. 432, Title I, § 13, 49 Stat. 1367; Oct. 28, 1949, c. 776, § 2, 63 Stat. 948; 7 U.S.C. 913.

SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effec-

tive date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243; 5 U.S.C. 1009.

SECTION 1 OF THE SHERMAN ANTITRUST ACT, AS AMENDED:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year,

or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 U.S.C. 1.

SECTION 3 OF THE CLAYTON ACT:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitior or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731; 15 U.S.C. 14.

ARTICLE 6, SECTION 4 OF THE LOUISIANA CONSTITUTION OF 1921:

The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and

power, water works, common carrier pipe lines, canals, (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts.

ARTICLE 19, SECTION 14, AS AMENDED, OF THE LOUISIANA CONSTITUTION OF 1921:

It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests for the purpose of forcing up or down the price of any agricultural or manufactured product

or article of necessity, for speculative purposes, and all combinations, trusts, or conspiracies in restraint of trade, commerce or business, as well as all monopolies or combinations to monopolize trade, commerce or business, are hereby prohibited in the State of Louisiana, and it shall be the duty of the Attorney General, of his own motion, or any District Attorney of the State, when so directed by the Governor or the Attorney General, to enforce this provision, by the injunction or other legal proceedings, in the name of the State of Louisiana, and particularly by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the State of Louisiana, and for the ouster from the State of foreign corporations. Provided, however, that nothing herein contained shall prevent the Legislature from providing additional remedies for the enforcement of this Section. (As amended Acts 1936, No. 318, adopted Nov. 3, 1936.)

LA. R.S. 45:121:

The term "electric public utility" as used in this Chapter means any person furnishing electric service, within this state, the parish of Orleans excepted.

LA. R.S. 45:123:

In order to encourage a further development of coordinated state-wide electrification based upon a planned economy, an electric public utility shall not render or extend its electric services or facilities to customers already receiving electric service from another electric public utility without first obtaining a certificate of public convenience and necessity from the Louisiana Public Service Commission. The Commission shall grant such a certificate only in the event that the

electric service already being rendered is inadequate, or that the rates for such electric service are unreasonable.

LA. R.S. 51:122:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. R.S. 51:123:

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. R.S. 51:124:

No person, engaged in commerce shall, in the course of such commerce, lease, sell, or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price, discount, or rebate on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods, wares, merchandise, machinery, or other commodities of a competitor of the vendor or lessor, where the effect of the sale, contract for

sale, or lease, or the condition, agreement, or understanding is to substantially lessen competition or tends to create a monopoly in any line of commerce.

REA BULLETIN 111-3. 29 FED. REG. 2765 (1964):

UNITED STATES DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

February 24, 1964

REA BULLETIN 111-3

SUBJECT: Power Supply Surveys

I. **Purpose:** This bulletin sets forth REA policy with regard to power supply surveys and certifications thereto by the Administrator in relation to the approval of loans for generation or transmission facilities.

II. **General:** The terms and conditions of power supply arrangements are major and critical factors in the ability of REA borrowers to carry forward the rural electrification program. REA has the responsibility to assist borrowers in achieving the most advantageous power supply arrangements to accomplish the objectives of the Rural Electrification Act and, without prejudice to the accomplishment of these objectives, to conserve REA loan funds. REA will undertake power supply surveys to assure adequate review of existing and proposed power supply alternatives and to encourage closer cooperation between REA borrowers and other electric power suppliers.

III. **Policy:**

A. **Requests for Power Supply Surveys:** Any REA borrower or potential borrower may request REA to

make a survey of any specific power supply problem or its power supply needs. Such request shall provide a full description of existing power supply contracts and arrangements, a statement of any special problems and a general summary of power supply needs, copies of any proposals made by existing or other suppliers, and a summary of negotiations pertaining to current or anticipated problems and needs. Distribution-type systems should submit such request and information to the area office; power-type systems should submit such request and information to the Power Supply Division.

B. **Conduct of Survey:** If the Administrator determines to undertake the requested power supply survey, the survey shall be so conducted as to provide an adequate review of the applicant's power supply problems and needs, existing or proposed power supply arrangements, if any, and such other potential power supply arrangements which, in the judgment of the Administrator, may contribute to the solution of those problems and needs. Where the Administrator finds existing or proposed contracts with power suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. The REA borrower or potential borrower shall be made a party to any negotiations between REA and such power supplier. When necessary to avoid dilatory tactics or protracted delays, the Administrator shall advise the parties in such cases of a definite time limit for negotiations under the survey and a final cut-off date for all proposals which are to be considered in evaluation of loan applications related to the problems and needs covered by the survey.

C. **Requirement for Consideration of Loan Application:** No loans for generation or transmission facilities will be made until a power supply survey has been completed by REA. No application for financing of generation or transmission facilities requiring a loan for either or both in an amount of more than $2 million will be accepted for consideration by REA unless (a) a power supply survey has been completed, or (b) it is determined by the Administrator that completion of the survey requires full review of proposed REA-financed generation or transmission facilities.

D. **Certification of Loans for Generation or Transmission:** No loan for generation or transmission facilities will be made except in compliance with Bulletin 20-6, "Loans for Generation and Transmission," dated May 31, 1961, and upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is (a) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (b) needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier; or (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator. Loans for generation or transmission facilities of more than $2 million shall be similarly certified to the Comptroller General. They shall also be certified to the Senate and the House of Representatives of the United States, as directed by the respective bodies. Certification of each generation or transmission loan

in excess of $2 million shall be accompanied by the following information:

1. The name and address of the applicant borrower and the date of the application.

2. Description and estimated cost of the proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

3. Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

4. Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

5. Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing suppliers, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

6. Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reason why such efforts have not been successful.

7. Explanation of the applicant's reasons for seeking an REA loan.

8. The amount of electric energy which the appli-

cant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

9. Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

10. Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

11. Names of State agencies and commissions having jurisdiction over the applicant borrowers.

Norman M. Clapp
Administrator

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APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(January 13, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

COLEMAN, Circuit Judge: On September 12, 1964, the Rural Electrification Administration, acting by and through its Administrator, approved a loan in favor of Louisiana Electric Cooperative, Inc., in the amount of $56,521,000. Of this sum, $27,079,200 was to be used in the construction of a 200,000 kilowatt steam generating plant. $28,184,000 of the proposed loan was to be used in the construction of 1,611 miles of high voltage transmission lines in Louisiana and 82 miles in Arkansas. $1,257,800 was earmarked to construct other facilities. By this loan the proposed borrower would be enabled to generate, sell, and transmit electric power to various electric cooperatives presently being served by the complaining investor-owned private power companies.

The Central Louisiana Electric Company, Inc., sought injunctions both preliminary and permanent. Louisiana Power and Light Company and Gulf States Utility Company were granted leave to intervene as plaintiffs. Testimony on the part of Central Louisiana Electric Company shows that its investment in plants and facilities dedicated to customers now about to be lost amounts to 5% of its total. The annual gross income to be lost is less than 4% of the whole.

Upon due notice, and upon consideration of the verified complaint, affidavits of plaintiff and other witnesses, defendant's motion to dismiss and motion for summary judgment, defendant's response to order to show cause why preliminary injunction should not issue and affidavit in support thereof, and on testimony adduced in support of the application, after receiving briefs and argument of the parties, the district court granted the preliminary injunction. Defendants, pending the further order of the court, were restrained and enjoined from consummating the loan and "from doing any act in furtherance thereof, including, but not limited to, the execution of any agreement or undertaking in connection therewith, and the disbursement or authorization of any disbursement of any funds in connection therewith". Defendants' motions to dismiss and for summary judgment were denied.

From the granting of the preliminary injunction, defendants have appealed, contending that appellees did not have "the requisite standing to maintain the suit * * * * the district court lacked jurisdiction over the subject matter of the action".

For the reasons hereinafter enumerated, we hold that the plaintiffs are without the requisite standing and the courts are without jurisdiction to review, necessitating a reversal of the judgment of the District Court.

Plaintiffs allege that on the day of the loan approval the Administrator certified to Congress that he had caused a power supply survey to be made in accordance with REA Bulletin 111-3; that, based on such survey, the approved loan is needed because existing and proposed contracts to provide facilities or service to be financed were found to be unreason-

able, each supplier involved had been so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator.

It is further alleged that the Administrator submitted to Congress an accompanying statement of information relative to the loan approval. It is contended that the loan approval is illegal and invalid, that the aforesaid certificate and statement of information are incorrect, and plaintiffs have thus "*suffered a legal wrong and are adversely affected or aggrieved thereby*", entitling them to a judicial review under 5 U.S.C.A. 1009.

In summary, the grounds alleged in behalf of relief were substantially as follows:

(1). The intent of Congress, as reflected by certain "directives of the House and Senate Appropriations Committees", had been violated;

(2). that on February 24, 1964, the Rural Electrification Administration published certain rules and regulations in the Federal Register (REA Bulletin 111-3) in which REA proposed to obey the directives of the Congressional Committees;

(3). the proposed loan violated the purposes of the REA Act, 7 U.S.C.A. 904, violated the directives of the Congressional Committees, violated Bulletin 111-3, and violated complainant's constitutional rights;

(4). complainant is a privately owned public utility engaged in the business of generating, transmitting, and distributing electric energy in 25 Louisiana parishes, with a

total investment of $112,968,468 in plant and facilities, with 1963 revenues of $20,774,023. It furnished wholesale electric service to six Louisiana electric cooperatives to which it had dedicated an investment of $5,615,561. Annual receipts from this activity for the twelve months expiring August 31, 1964, amounted to $712,134 at an average cost of 6.87 mills per Kilowatt hour, "which rate is among the lowest in the nation for such service, and complainant is ready, willing and able to serve all of the present and foreseeable future requirements of said member cooperatives on an adequate and dependable basis";

(5). the super cooperative, to which it was proposed to make the loan, has no transmission or distribution facilities and does not furnish electricity to anyone. It was created for the sole purpose of selling to its own members who now buy from the complainant or other privately owned power companies;

(6). that under 7 U.S.C.A. 901 Congress created a duty on the part of the defendants and in favor of complainants not to grant loans when existing central station service was available;

(7). that the loan is proposed in violation of the Congressional directive and the rules adopted by REA for its own governance;

(8). that the administrator took the position that existing and any proposed contract between the private power companies and the existing cooperatives would be considered unreasonable unless the companies agreed to an exclusive territorial monopoly in favor of said cooperatives;

(9). that the lowest rate at which the super cooperative could furnish electricity to its members, pursuant to the loan, would be 7.5 or 8 mills per Kilowatt hour, whereas the companies had offered lower rates;

(10). *that the loan would create an unjustifiable subsidy in favor of a direct competitor*, in violation of 7 U.S.C.A. 904, that in this regard the approval of the loan was arbitrary and capricious, *amounting to unjust and unwarranted discrimination in favor of a competitor*, denying to complainant the equal protection of the laws and depriving it of its property without due process of law in violation of the 5th Amendment (emphasis added).

(11). the proposed loan violates 7 U.S.C.A. 904 in that the consent of the state authority having jurisdiction had not been obtained;

(12). the super cooperative had not obtained a certificate of public convenience and necessity from either Louisiana and Arkansas, and the REA Administrator had certified that none was necessary, thus subjecting the complainant to illegal competition;

(13). that the consent of the Federal Power Commission had not been obtained, which, again would result in illegal competition;

(14). that the super cooperative will require a thirty-five year contract with its members, which will deny to complainant a substantial portion of its market for wholesale power;

(15). that compliance with the Administrator's require-

ments would result in combination and conspiracy in restraint of trade; and

(16). that granting the loan would cause a violation of the anti-trust laws of the United States and the State of Louisiana, and amounts to a conspiracy to do such.

Then followed the customary prayer for injunctions, preliminary and permanent.

The district court made findings of fact substantially supporting these allegations. These findings will be set out verbatim in an appendix to this opinion.

II

Under Section 10(a) of the Administrative Procedure Act, 5 U.S.C.A., Section 1009, it seems to be settled in a case of this kind that if Congress has failed to give an appellant standing to sue by express or implied provisions of statute * * * mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue to restrain such action. *Pennsylvania Railroad Company v. Dillon*, D.C. Cir., 1964, 335 F. 2d 292, citing *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939); *Alabama Power Company v. Ickes*, 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374 (1938); *Kansas City Power and Light Company v. McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. denied, 350 U.S. 884, 76 S. Ct. 137, 100 L. Ed. 780 (1955); and *Texas State AFL-CIO v. Kennedy*, 117 U.S. App. D.C. 343; 330 F. 2d 217 (1964). On December 14, 1964, the Supreme Court denied certiorari in the *Pennsylvania Railroad* case sub.

nom. *American Hawaiian Steamship Company v. Dillon*, 379 U.S. 945, 85 S. Ct. 437, 13 L. Ed. 2d 543. This was two weeks after the granting of the preliminary injunction in the instant case, which issued on December 1, 1964.

From the foregoing, we are of the opinion that the correct decision of this appeal is to be found in the answers to the following questions:

1. Does this case raise anything more than "mere economic competition made possible by governmental action"?

2. If not, has Congress, expressly or by implication, given appellees standing to sue under the terms of the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C.A. 901, et seq.?

3. Has Congress, expressly or by implication, conferred jurisdiction on the Courts to review the granting or denial of a proposed REA loan?

In view of the effort to invoke Amendment 5 of the Constitution, we add a fourth question:

Have appellees shown any legally protected property right to be free of competition from the prospective borrower?

In answering these questions we bear in mind (a) that this Court does not find the facts and (b) appellees must demonstrate "statutory aid to standing". *Pennsylvania Railroad Company v. Dillon, supra.*

III

We take the Constitutional question first.

It must be conceded as a fact that up until now the complaining companies have been the sole source of electric power for the REA cooperatives who would buy exclusively from the beneficiary of the loan if the loan is made. There is, however, nothing in the record to indicate that plaintiffs are the owners of an exclusive franchise, lawfully granted, entitling them, and no others, to generate, distribute, and sell electric power in the territory involved. Indeed, the President of Central Louisiana Electric Company testified that he was unable to recall any certificates of convenience and necessity held by that company from the Public Service Commission of Louisiana. The other complaining companies made no proof of any such certificates. Granting that such certificates, if they existed, might not be exclusive, none of any kind are shown. This takes this case out of the principles announced in *Whitney National Bank v. Bank of New Orleans and Trust Company*, 323 F. 2d 290, reversed on other grounds 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386. In that case the District of Columbia Circuit held that a duly *chartered* state bank had standing to challenge the establishment of a competing bank in violation of state law. In the Supreme Court the case went off on the point that the Federal Reserve Board had exclusive original jurisdiction. It is interesting to note, however, that the D.C. Circuit cited *Alabama v. Ickes, supra*, as authority for the rule that "one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which simply increases the amount or effectiveness of competition".

Lack of any franchise or certificate of an exclusive nature also takes this case out of the rule announced in *National Bank of Detroit v. Wayne Oakland Bank*, 252 F. 2d 537, cer-

tiorari denied 358 U.S. 830, wherein the Sixth Circuit held that an exclusive banking franchise granted by state law was a valuable property right which could not be invaded by one acting under authority of the Federal Government.

The complaining companies are the only ones of their kind presently in the territory. Our attention has been directed to no statute or contract, however, which would entitle them to remain so, to the exclusion of all others and free of competition. Since no such right is shown to exist, then it necessarily follows that there can be no property right in that regard. It further follows that making a loan for the construction of competitive facilities is not a deprivation of property rights guaranteed by the Fifth Amendment. If the new cooperative has a right to compete then those who have heretofore purchased electric power from the complaining companies certainly have the right, if they wish, to buy from the new establishment.

Appellees have no doubt known all along that they did not hold exclusive franchises. Since 1936 they have known of the Rural Electrification Administration, its powers and purposes. They have made investments and conducted operations in an awareness that the Rural Electrification Administration was in business, with power to make a loan to someone to finance the construction of generators and transmission facilities. The appellees have been and are now doing business with cooperatives established and financed under the REA Act. The record shows no intention or attempt to abrogate *existing contracts* between the parties. Appellees do not have a Constitutionally guaranteed, unrestricted privilege to engage in business free of competition. *Cf. Nebbia v. New York*, 291 U.S. 502, at 527.

IV

Does the case raise anything more (in the words of *Dillon*) than "mere economic competition made possible by governmental action"? We think not.

Without repeating what has already been said, the proof simply shows that whereas the companies have heretofore been the sole occupants of this particular territory, they are to be replaced at some date in the future by a competitor financed under a Federal statute now nearly thirty years old. They are to completely lose customers which heretofore they alone had, but *this is not an unusual product of competition.*

Under the rule of *Pennsylvania Railroad Company v. Dillon, supra,* this eliminates from consideration the allegation of illegal acts by the REA Administrator.

V

From the entire history of the Rural Electrification Act and its administration we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the courts. The Act itself makes no provision for judicial loan review. By the allegations of the Complaints we are informed of the thorough manner in which Congress has ridden herd on the REA. Congressional Committees caused the promulgation of REA Bulletin 111-3, which appellees now say has been violated. Certainly, the demands of Congressional Committees do not have the force of law. Congress has seen fit not to enact these particular demands into law, evidently being most content to rely on the deadly sword constantly in its own hands, that is, the sole control

of the purse out of which the loans are made. Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress.

VI

Appellees have invited our attention to *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403. It was there held that the discharge of Service from career employment in the State Department would be set aside because the Secretary of State had not followed Regulations which he had promulgated. The opinion cited *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681, which held that Regulations promulgated by the Attorney General were binding on him. Service was losing a career service job to which he was otherwise lawfully entitled. Accardi was about to be deported without a hearing to which he was lawfully entitled. These situations were not analogous to that now before us. Service and Accardi had a direct justiciable interest in what was about to happen directly and specifically to personal rights guaranteed by law.

Appellees here are not parties to the loan. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law. They are not having any penalty or forfeiture directly assessed against them. They come into court to halt a loan to a third party, contending that the loan is being illegally made and, in the future, will cause illegal consequences. Their only standing for this is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right.

This Court is well aware of the decisions of the Supreme Court in *Alabama v. Ickes*, *Tennessee Power Company v. TVA*, and *Kansas City Power and Light Company v. McKay*, cited previously in conjunction with *Pennsylvania Railroad Company v. Dillon*. We do not here enter into an elaborate discussion of these cases. They are duly reported and speak for themselves. Basically, of course, these cases are authority for the proposition that appellees do not have the standing to sue. Appellees, however, point to the language in *Alabama Power Company v. Ickes*, wherein the Court said: "* * * If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* consummation of the loans and grants will not constitute an actionable wrong. * * * ".

The gap here, if there be one, was filled in *Pennsylvania Railroad v. Dillon, supra*, on which the Supreme Court denied certiorari. It may be well to point out, however, that in the case now about to be decided the distinguished trial Judge in his conclusions of law refers only to statutory authority, illegal competition, violation of state and federal anti-trust laws, violation of 7 U.S.C.A. 904, and conspiracy by appellants to injure appellees' business. The trial Court did not use the words "fraud, malice, or coercion", nor did it use language clearly synonymous thereto. As to conspiracy, the undisputed proof shows, beyond question, that appellants have cooperated with the borrower-applicant to make a loan which will cause serious competition. This will hurt complainants' business, as would competition from any source. In our judgment this was not what the Supreme Court had in mind when it spoke of conspiracies in the *Ickes* case. Of course, the Supreme Court did not spell this out because there was no

question of conspiracy then before it. The record reflects much feeling between the parties over granting the rural cooperatives territorial integrity for their operations. Apparently, from the record, Louisiana makes no effort at regulation in this regard but leaves all such parties to fight it out, unpoliced, among themselves. No party to this litigation has any certificate of convenience and necessity from Louisiana authorities. Since the cooperatives owe money to the United States we cannot see that the Administrator is guilty of a conspiracy in the legal sense when he seeks to insure the operating solvency of the debtors, not to mention their financial ability to render reasonably effective service to their customers.

VII

We consider it completely appropriate to say that this Court has approached this case with sincere deference for the findings and views of the able and conscientious Judge who heard it in the first instance. We are nevertheless constrained to the opinion that appellees did not have the requisite standing to bring this action and neither do the Courts have jurisdiction to review the granting or denial of loans by the Rural Electrification Administration. Congress has not conferred such jurisdiction by specific language; Congressional action negates rather than implies an intent to confer such jurisdiction. The Judgment must be reversed.

VIII

This means, of course, that the preliminary injunction is dissolved. We appreciate, however, the various considerations of public interest involved in this litigation and which received such painstaking study below. With this in mind, of

our own motion, we stay our judgment in the following particulars and under the following conditions:

That part of the preliminary injunction which restrained the making and disbursing of the loan shall remain in full force and effect for such length of time as appellees may require for a timely exhaustion, if they so desire, of any remedy of review and decision available in the Supreme Court. In all other respects the preliminary injunction is immediately dissolved.

Reversed, with a partial stay as to the dissolution of the preliminary injunction.

APPENDIX TO OPINION

FINDINGS OF THE DISTRICT COURT IN GRANTING PRELIMINARY INJUNCTION

3.

"The requirements for consideration of a loan application under 7 U.S.C. 904 were set forth by the Administrator in REA Bulletin 111-3, 29 Federal Register 2765 (1964), and this bulletin states that no loan shall be granted except upon certification by the Administrator to the Secretary of Agriculture of the completion of a power supply survey showing that the loan is

> "* * * (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier was so advised, REA attempted to have such contracts made reasonable, and the existing or other

proposed supplier had failed or refused to do so within the time set by the Administrator."

4.

"The REA Bulletin 111-3 was promulgated by the Administrator at the direction of the Appropriations Committees of the Eighty-eighth Congress, and the Bulletin was published in the Federal Register at their direction. After its publication the Administrator assured the committees that it was issued in compliance with their directives and would be followed by him in the administration of the Rural Electrification Act.

5.

"In approving the loan, the defendant Administrator certified that the requirements of the Bulletin had been complied with by him, and the evidence showed that, in fact, on February 13, 1964, the Administrator initiated a power supply survey pursuant to this Bulletin and notified plaintiff and other Louisiana suppliers of electricity to cooperatives that future power arrangements between them and the cooperatives must meet three requirements, namely;

1. The cooperatives must obtain power at the lowest possible cost under relatively short-term contracts;

2. The cooperatives must be assured contractually of an adequate power source and of its availability to meet future needs; and

3. Means must be found, legislatively or otherwise,

to assure the territorial integrity of the cooperatives.

6.

"During the course of negotiations conducted between the parties, the Administrator refused to consider the reasonableness of contract proposals made by plaintiff and the other companies with respect to cost of power and conditions of availability and delivery of electricity unless the private companies first agreed to contractually assure the cooperatives of territorial integrity or immunity.

7.

"Upon advice of counsel, plaintiff and the other companies refused to incorporate into their power supply contract proposals provisions designed to accomplish the Administrator's territorial immunity demands. Although the Administrator admitted that the territorial requirements could not legally be incorporated into power supply contracts, he certified that the loan was approved because the existing suppliers failed to satisfy these same requirements. The plaintiff thus made a prima facie showing that the Administrator violated Bulletin 111-3 in failing to advise plaintiff and the two other suppliers wherein their contract proposals were unreasonable in any respect about which they could legally contract.

8.

"Plaintiff made a prima facie showing, not rebutted by defendants, that the proposed wholesale supply contracts of

plaintiff and other private suppliers were reasonable with respect to price of power, term of contract, adequacy and dependability of power supply and responsibility to deliver power; and, in fact, that the price of power, term of contract and adequacy and dependability of power supply under their proposals were considerably more favorable to the cooperatives than the contracts which they would probably be required to enter into with Louisiana Electric Cooperative, Inc.

9.

"Louisiana Electric Cooperative, Inc., upon consummation of the loan, would serve customers already being served by plaintiff and the generation and transmission facilities to be constructed by Louisiana Electric Cooperative, Inc. would duplicate facilities owned by plaintiff valued at approximately $5,600,000.00 and dedicated to providing service to its cooperative customers. The defendants have not required that Louisiana Electric Cooperative, Inc. obtain any certificate of public convenience and necessity from the Louisiana Public Service Commission. A show cause petition directed to that cooperative and involving this issue is presently pending before the Louisiana Public Service Commission.

10.

"Plaintiff made a prima facie showing that the construction of facilities with the loan funds would result in higher electrical rates for the cooperatives; a less dependable power supply than presently available; power supply contracts with less favorable terms than existing and proposed contracts with private power suppliers; and that there was no justification therefor within the intent and purposes of the Rural

Electrification Act. Plaintiff alleges and on the basis of evidence adduced has made a prima facie showing that the construction of facilities under the proposed loan will cause plaintiff and the other utility companies to be excluded from a substantial segment of the wholesale power business within the State of Louisiana for a lengthy period of time and that this was the true purpose behind the approval of the loan.

11.

"Plaintiff has made a prima facie showing that defendants conspired with the cooperatives to deprive plaintiff of its business, to substantially lessen if not completely destroy competition in the wholesale power business in the State of Louisiana, and without jusification, to promote ownership of electrical utilities by cooperatives rather than by privately-owned electrical companies, and were motivated by a desire to cause injury or financial loss to plaintiff.

12.

"If plaintiff is denied an injunction at this time, it is likely that during the course of the litigation the loan may be consummated and construction may be begun on the generation and transmission facilities. Such action during the pendency of this proceeding would have an adverse effect on the public interest. It would be more convenient for all parties hereto to have the legality of the loan determined before its final consummation and before construction is begun. Plaintiff would suffer irreparable harm with the consummation of the loan, and defendants will suffer no injury or harm if the *status quo* is maintained through the issuance of an injunction."

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with a partial stay as to the dissolution of the preliminary injunction, in accordance with the opinion of this Court.

January 13, 1966

Issued as Mandate: Feb. 15, 1966

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR REHEARING

February 7, 1966

ON MOTION FOR REHEARING

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

The appellant's motion for rehearing filed in the above styled and numbered cause is hereby

DENIED.

APPENDIX C

EXCERPTS FROM CONGRESSIONAL COMMITTEE REPORTS AND SUBCOMMITTEE HEARINGS

H. R. REP. NO. 355, 88TH CONG., 1ST SESS. 7, 8 (1963):

"RURAL ELECTRIFICATION PROGRAM

* * *

"A majority of the members of the committee believe the right to make loans for power generation and transmission purposes, with funds available to implement such right, if necessary, is absolutely essential to enable REA cooperatives to obtain reasonable contracts from private power suppliers with regard to rates, terms, and conditions. However, a study of the REA Act and its history clearly shows it was never intended that this authority be used except for substantial reasons, and not merely to supplant private suppliers.

* * *

"Before public funds are loaned for power generation or transmission, a majority of the committee believes the REA Administrator, in connection with any such loan, should make a survey, determine wherein the existing contract for power or the proposed contract is unreasonable, advise the supplier wherein such contract is unreasonable and attempt to get such contract modified to make it reasonable. Loans should be made only when reasonable contracts cannot be obtained.

"With regard to any further generation and transmission loan approved, the Administrator should certify to the Secretary of Agriculture that each of these steps has been taken and that the private supplier had been given an opportunity to make the contract reasonable, specifying the details, and had refused or failed to do so. * * * "

SEN. REP. NO. 497, 88TH CONG., 1ST SESS. 27 (1963):

"RURAL ELECTRIFICATION ADMINISTRATION

"ELECTRIFICATION LOAN PROGRAM

* * *

"The committee recognizes that the House recommended a new procedure for REA after hearing the differing points of view surrounding the loans made by the Rural Electrification Administration for generation and transmission purposes.

"This committee concurs with the recommendations set forth in the House committee report, to wit:

"Before public funds are loaned for power generation or transmission, the Rural Electrification Administrator, in connection with any such loan, should:

"(1) Make a survey and determine wherein the existing contract for power or the proposed contract is unreasonable;

"(2) Advise the supplier wherein such contract is unreasonable; and

"(3) Attempt to get such contract modified to make it reasonable.

"Loans should be made only when reasonable contracts cannot be obtained.

"With regard to any further generation and major transmission loan approved in excess of $2;000,000, the Administrator shall certify to the Secretary of Agriculture, the Comptroller General, and the Congress, that each of these steps has been taken and that the private supplier had been given an opportunity to make the contract reasonable, specifying the details, and had refused or failed to do so.

"The Administrator also shall furnish the Comptroller General and the Congress on the date of approval of each such loan application, the following information:

"(1) The name and address of the applicant borrower and the date of the application.

"(2) Description and estimated cost of the proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

"(3) Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

"(4) Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

"(5) Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing suppliers, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

"(6) Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reasons why such efforts have not been successful.

"(7) Explanation of the applicant's reasons for seeking an REA loan.

"(8) The amount of electric energy which the applicant will cease to purchase from present power suppliers upon

construction of the generating plant for which REA financing is being sought.

"(9) Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

"(10) Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

"(11) Names of State agencies and commissions having jurisdiction over the applicant borrowers. * * * "

H. REP. 1088, 88TH CONG., 1ST SESS. 11 (1963):

"RURAL ELECTRIFICATION ADMINISTRATION

" * * * Regulations, including changes, to carry out provisions in the reports of the House and Senate Committees shall be printed in the Federal Register within 90 days of enactment of this Act. * * * "

HEARINGS BEFORE SUBCOMMITTEE OF H. R. COMMITTEE ON APPROPRIATIONS, DEPARTMENT OF AGRICULTURE APPROPRIATIONS FOR 1965, 88TH CONG., 2D SESS., PART 4, P. 12 (1964):

" * * * MR. CLAPP. I might briefly summarize at this time. The House Committee last year, in its report, made certain recommendations with respect to our procedures on generation and transmission loans and section 5 loans. With respect to generation and transmission loans, it directed that we should make a survey before loaning any further funds for these purposes and that in cases where there were existing

or proposed contracts we should, if these contracts are deemed unreasonable, be sure to give the supplier a statement as to the particulars in which we regarded them as unreasonable, give the supplier an opportunity and assist him in any way we could to make them reasonable, and make the loan only if he neglected or failed or refused to do so. We were also directed to certify to the Secretary of Agriculture in connection with any future generation or transmission loans, that the survey had been made and that these steps had been followed.

"Bulletin 111-3, which was issued February 24, outlines the procedures and policies which we now follow in response to this language of the House committee and also in response to language of the Senate committee generally endorsing the House language and adding certain procedures with respect to generation and transmission loans of over $2 million.

"Briefly, this bulletin provides that we do not make any generation or transmission loan without making the survey as recommended by the committee. And we make the certification to the Secretary, when such a loan is made, that the survey has been made and that the loan is necessary, based upon our normal criteria for generation and transmission loans, either because it is needed to construct facilities to implement an existing contract, or a proposed contract with an existing power supplier, or because it is needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier, or in the case of the type of situation specifically spelled out by the committee language, where there are existing contracts or proposed contracts which we have regarded as unreasonable; that we have in the course of the survey advised the supplier in what way these contracts or proposals are unreasonable, and given the supplier an opportunity to make them reasonable; and that the loan is made and is necessary because in spite of these efforts the contracts or proposals have not in fact been made reasonable.

"In connection with the generation and transmission loans of over $2 million, to which the Senate committee addressed its report, we make a more detailed certification which is supplied to the Comptroller General and the Senate and the House of Representatives as directed by these respective bodies. This not only certifies to the fact the survey has been made, but it also supplies information in response to 11 specific questions set forth in the committee report. * * * "

HEARINGS BEFORE SUBCOMMITTEE OF THE SEN. COMMITTEE ON APPROPRIATIONS ON H. R. 11202, 88TH CONG., 2D SESS., VOL. II, P. 117, 118 (1964):

" * * * Senator Holland. All right. Now, Mr. Clapp, I have before me your letter of June 22 in which you recite the Senate Committee report accompanying the 1964 bill and the House committee report and include references to procedural bulletins that have been issued by your agency.

"Can you assure the committee that the procedures which have been set forth in your new regulations comply with the Senate committee reporting requirements?

"REA COMPLIANCE WITH DIRECTIVES

"Mr. Clapp. We feel that they fully comply with the requirements, Mr. Chairman, and as the letter indicates, we have actually gone a little bit beyond the requirements to assist the committees in keeping their records current.

* * *

"June 22, 1964.

"Hon. Spessard L. Holland,
U. S. Senate.

"Dear Senator Holland: Senate Report No. 497 accom-

panying the Department of Agriculture and related agencies appropriation bill for 1964, contained a number of recommendations, requests, and instructions concerning activities of the Rural Electrification Administration. In addition, the conference report on this bill provided that regulations, including changes, to carry out provisions of the reports of the House and Senate committee should be printed in the Federal Register within 90 days of enactment of this act. This letter summarizing REA actions, including (sic) issuances which were developed or changed, and materials placed in the Federal Register, pursuant to the reports of the Committees on Appropriations and the conference report. * * * "

H. R. REP. NO. 1387, 88TH CONG., 2D SESS. 44 (1964):

" * * * The Administrator of REA is to be commended for his cooperation in formulating and issuing regulations in accord with the directives in last year's reports of the House and Senate committees. In connection with last year's report of this Committee, it should be clearly understood that the directives contained therein were intended to apply to generation and transmission loans to G&T cooperatives and not to relatively small transmission loans to distribution cooperatives. The regulations issued recently pursuant to these directives should be interpreted and administered on this basis. * * * "

SEN. REP. NO. 1331, 88TH CONG., 2D SESS. 36 (1964):

" * * * Last year the committee report directed the Administrator of the Rural Electrification Administration and the Secretary of Agriculture to carry out certain procedures in connection with generation and transmission loans and loans made under section V of the Rural Electrification Act. It is the belief of the committee that the Administrator has responded to these committee directives and the committee is hopeful that the Administrator will see to it that these directives are carried out in the current fiscal year. * * * "

SEN. REP. NO. 423, 89TH CONG., 1ST SESS. 32 (1965):

" * * * This committee, in conjunction with the House Committee, in Report No. 497, 88th Congress, 1st session, imposed certain duties and responsibilities upon the REA Administrator to its borrowers and their power suppliers to be complied with before approving loans for generation and transmission facilities.

"The committee directs the REA Administrator's attention to this action and the regulations promulgated thereunder and reiterates its instructions that every effort be made to obtain reasonable wholesale power supply contracts before lending public funds for generation and transmission facilities. * * * "

HEARINGS BEFORE SUBCOMMITTEE OF THE SEN. COMMITTEE ON APPROPRIATIONS ON H. R. 11202, 88TH CONG., 2D SESS., VOL. II, P. 160 (1964):

" * * * Mr. Clapp. There are problems in trying to do this (resolve territorial problems) through contract because of antitrust implications and unless the parties will do it voluntarily without contractual commitment and simply play the part of good neighbors to one another it seems as though some kind of State legislation is the only way you can bring this about. * * * "

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL.,
Petitioners

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 236 F. Supp. 271. The opinion of the court of appeals (Pet. App. B. pp. 34-47) is reported at 354 F.2d 859.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966. A timely petition for rehearing was denied on February 7, 1966. The petition for a writ of certiorari was filed on May 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have standing to attack a proposed loan by the Rural Electrification Administration to finance the construction of generation and transmission facilities by a rural electric cooperative which will compete with petitioners.

STATUTES INVOLVED

1. Section 4 of the Rural Electrification Act, 49 Stat. 1365, as amended, 7 U.S.C. 904, provides:

> Loans by Administrator for electrical plants and transmission lines; preferences; consent of State authorities
>
> The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the

extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefore as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section, prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating

plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed.

2. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a), provides:

Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

STATEMENT

Petitioners instituted this action in the United States District Court for the Western District of Louisiana to enjoin the consummation of a loan by the Rural Electrification Administration ("REA") to the Louisiana Electric Cooperative, Inc. ("LEC"), a cooperative organized pursuant to the Louisiana Electric Cooperative Law (La. R.S. 12:301, *et seq.*),

which proposes to generate and transmit electric power at wholesale to member cooperatives, which, in turn, will distribute the power to individual members (R. 3, 370). The district court granted a preliminary injunction (R. 419, 421), and the court of appeals reversed (Pet. App. 34-47).

1. REA is an agency within the Department of Agriculture charged by Congress under the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901, *et seq.*, with the responsibility of making loans to finance the construction and operation of generating plants and electric transmission and distribution systems which will furnish electric energy to rural areas not receiving central station power. The Administrator is given general discretion, within specified limits, to set the terms and conditions of the loans, but the consent of the State authority having jurisdiction over such facilities must be obtained before an REA loan may be made. 7 U.S.C. 904, pp. 2-4, *supra*.

Procedures applicable to the making of generation and transmission loans are prescribed in an REA policy statement (REA Bulletin 111-3) published in the Federal Register. 29 Fed. Reg. 2765-2766, Pet. App. 29-33. Under this policy statement, the Administrator must (1) make a survey and determine wherein existing or proposed power supply contracts are unreasonable; (2) advise present suppliers why their contracts are unreasonable; and (3) attempt to have the contracts modified to make them reasonable.

2. LEC filed its application for a 56.5 million dollar generation and transmission loan with REA on August 3, 1962 (R. 35). On September 12, 1964, the applica-

tion was provided by the Administrator (R. 370), who certified to the United States Congress, in accordance with REA Bulletin 111-3 (see also S. Rep. No. 497, 88th Cong., 1st Sess.), that a power survey had been made, that the loan was needed because existing and proposed contracts between the member cooperatives and the privately owned power companies had been found to be unreasonable, and that the private power companies had failed or refused to modify these contracts to make them reasonable (R. 34). The Administrator said that the power companies had encroached upon the cooperatives' service areas and had failed to provide territorial integrity for the member cooperatives in their service areas. The Administrator also certified to Congress that no State agency had jurisdiction over the activities of the federated cooperative (R. 43-44, 45).[1]

3. On September 30, 1964, petitioner Central Louisiana Electric Company ("CLECO"), a supplier of power at wholesale to six of LEC's member distribution cooperatives, filed the present action to enjoin REA from consummating the approved loan. CLECO alleged, *inter alia*, that the Administrator had failed to comply with the "central station service" requirement of Section 4 of the Rural Electrification Act, 7 U.S.C. 904 (p. 2, *supra*), and with provisions of REA Bulletin 111-3. It also alleged that the loan would permit the operation of generation and transmission facilities

[1] La. Rev. Stat. 12:326 provides: "Cooperatives transacting business in this state pursuant to this Part shall be exempt in all respects from the jurisdiction and control of the Public Service Commission of this state."

in violation of the State law requirement that such facilities be based upon a certificate of public convenience and necessity.[2] Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009 (p. 4, *supra*), was invoked (R. 4-5) as conferring upon CLECO the standing to sue. CLECO alleged that if the federated cooperative obtained the loan and constructed the generating and transmission facilities, CLECO would lose business since LEC's member cooperatives would need less of CLECO's electric power (R. 9).

REA moved to dismiss the complaint, *inter alia*, on the ground that petitioner lacked standing to maintain the action (R. 118). The district court denied the motion and issued the preliminary injunction sought by CLECO (R. 419, 421). It also granted the motion of petitioners Louisiana Power & Light Company and Gulf States Utilities Company for leave to intervene as plaintiffs (R. 421). On appeal from the preliminary injunction, the Court of Appeals for the Fifth Circuit reversed on the ground that "the plaintiffs are without the requisite standing" to challenge the Administrator's determination to make the loan in question.

ARGUMENT

The court below correctly held that petitioners lack standing to challenge REA's loan to the cooperative. See *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464. See also *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A.D.C.) certiorari denied, 350 U.S. 884. Neither the Administrative Procedure

[2] La. Rev. Stat. 45:123.

Act nor the Rural Electrification Act conferred standing on petitioners to prevent a loan to a potential competitor.

1. It is well settled that Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009 (p. 4, *supra*) does not confer standing to sue on parties who do not otherwise have a sufficient interest to entitle them to legal relief. See, *e.g., Kansas City Power & Light Co.* v. *McKay, supra; Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency,* 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914; *Duba* v. *Schuetzle,* 303 F. 2d 570 (C. A. 8); *Gart* v. *Cole,* 166 F. Supp. 129, 134 (S.D.N.Y.), affirmed, 263 F. 2d 244 (C.A. 2), certiorari denied, 359 U.S. 978. See also *Pennsylvania Railroad Co.* v. *Dillon,* 335 F. 2d 292 (C.A.D.C.), certiorari denied *sub nom. American Hawaiian Steamship Co.* v. *Dillon,* 379 U.S 945; Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255, 287; Note, 104 U. Pa. L. Rev. 843, 861. To the extent that Section 10 authorizes suit by any person "suffering legal wrong" or "adversely affected or aggrieved" (p. 4, *supra*), it was intended to be declaratory of existing doctrines regarding standing. Hence petitioners were entitled to sue only if the applicable statute or traditional doctrines entitled them to maintain this action.

2. Nothing in the Rural Electrification Act can be read as reflecting a congressional intent to accord to private power companies the right to halt loans made under the Act. The legislative history clearly shows that Congress' dominant objective was to provide electric power to those in rural areas who were without it.

Congress demonstrated no interest in protecting existing power companies from competition. See, *e.g.*, 80 Cong. Rec. 2752; Hearings before House Committee on Interstate and Foreign Commerce on S. 3483, 74th Cong., 2d Sess., pp. 56-57. The Act neither provides for notice and hearing with respect to proposed loans nor does it contain any reference whatever to "person aggrieved,"[3] "any person who will be adversely affected,"[4] "any party in interest,"[5] or any of the other phrases found in statutes which have been construed as granting a statutory right to sue. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-477. For these reasons the Court of Appeals for the District of Columbia Circuit squarely held more than 10 years ago that the Rural Electrification Act does not confer standing upon power companies to challenge, as violative of the Act's standards, loans approved by the REA Administrator. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884. Congress has not, since that decision, seen fit to amend the Act to provide for judicial review, at the behest of existing companies,

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[3] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[4] *E.g.*, Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[5] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

of the approval of a loan application by a potential competitor.[6]

Nor can the necessary standing be supplied by the procedures prescribed in REA Bulletin 111-3 (Pet. 8-10). The bulletin sets out procedures to be followed in administering the lending program authorized by the Act. Competing power companies have no right to enforce the terms of the Act itself; they obviously have no greater rights with respect to the bulletin.

3. Nor do traditional principles of standing accord petitioners a right to bring this action. This Court has repeatedly held that damage flowing from lawful competition, though assisted by assertedly unlawful federal action, is *damnum absque injuria*. *Alabama*

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[6] In 1962 Mr. Walter Bouldin of Alabama Power Company proposed before the House Committee on Agriculture that the Rural Electrification Act be amended to read:

> *Provided*, That loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned, taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision made for interested parties to be heard in connection therewith.

Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 2d Sess., pp. 680-681. The House Committee did not take favorable action on this proposed amendment. In 1963, Mr. Bouldin's proposal was incorporated in two House bills, H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess. These bills in express terms provided for judicial review:

> Provided further than any determination by the Secretary of Agriculture under the Act with respect to generation and transmission loans shall be subject to review in the same manner as orders of the Secretary subject to the Act of December 29, 1950, as amended * * * [the Administrative Orders Review Act, 5 U.S.C. 1031 *et seq.*]

The House also failed to take favorable action on these bills.

Power Co. v. *Ickes, supra; Tennessee Power Co.* v. *Tennessee Valley Authority, supra.* See also *Kansas City Power & Light Co.* v. *McKay, supra.* Cf. *Pennsylvania Railroad Co.* v. *Dillon, supra; Pittsburgh Hotels Assoc.* v. *Urban Redevelopment Authority,* 309 F. 2d 186 (C.A. 3), certorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelopment Authority,* 372 U.S. 916; *Berry* v. *Housing and Home Finance Agency,* 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home Finance Agency,* 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967.

Petitioners' allegation of a "conspiracy" between REA and the cooperative does not render this line of decisions inapplicable. Virtually identical allegations were made in both the *Tennessee Power Co.* and *Kansas City Power and Light Co.* cases, and they were deemed insufficient to confer standing. See Transcript of Record in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* No. 27, O.T. 1938, pp. 55-58; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d at 929.

Similarly, petitioners' standing to seek an injunction against the loan is not enhanced by their claim (Pet. pp. 11-12) that the competition will be unlawful because the operation of the generation and transmission facilities will be in violation of State law. The record is barren of evidence that petitioners possess property rights under State law which would be invaded by the cooperative's proposed operations. Indeed, petitioner CLECO's president conceded that his

company does not possess a certificate of convenience and necessity to operate in Louisiana (R. 352).[7] Nor does the cooperative's power to operate facilities which it will construct under the loan constitute a license to conduct its operations in violation of State law. Issues of Louisiana law are presently being litigated in the proper forums—the Louisiana Public Service Commission and the courts of that State. If it is eventually determined in those proceedings that the operation of the facilities would violate Louisiana law, the State courts can, of course, fashion an appropriate remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JOHN W. DOUGLAS,
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ALAN S. ROSENTHAL,
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JULY 1966.

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[7] For this reason alone, petitioners' reliance upon *Frost* v. *Corporation Commission*, 278 U.S. 515, is misplaced. In that case, the plaintiff possessed a franchise which was directly infringed by the State governmental action claimed to be illegal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY,

Petitioners,

—v.—

RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE, and ORVILLE L. FREEMAN, Secretary of The United States Department of Agriculture,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1965

No. 1276

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY,

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ARGUMENT

Respondents' brief in opposition to the petition for a writ of certiorari fails to address itself to the questions which are presented in this case and which petitioners are asking this Court to consider. Instead, it discusses this case in terms of

a question which has been framed in an effort to convince this Court that petitioners are foreclosed by authorities which are not dispositive of the real issues which form the basis of the petition. Respondents seek to avoid the precise issues presented by urging that this case only involves an attack on a proposed loan by the Rural Electrification Administration to finance the construction of facilities which will be used to compete with petitioners. This is not the issue. Legal wrongs against petitioners were committed by the Administrator, and these wrongs form the basis for their claim to the right of judicial review.

Petitioners have asked this Court to review the question of whether the Administrator of the Rural Electrification Administration, or any other administrator, may declare to a party that he will deal with him pursuant to his own regulation, in an effort to extract from him favorable concessions, but still be free to ignore the regulation arbitrarily and capriciously after the party has acted in accordance therewith.* Notwithstanding the obvious general importance of this question, respondents have devoted to it but a single paragraph.**

Respondents reason that since petitioners have no authority to enforce the Rural Electrification Act, they are powerless to question the Administrator's violation of his regulation which directly and adversely affects them, although respond-

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* Petitioners feel that the other questions presented in their petition need no further amplification here.

** At page 10 of their brief, respondents state: "Nor can the necessary standing be supplied by the procedures prescribed in REA Bulletin 111-3 (Pet. 8-10). The bulletin sets out procedures to be followed in administering the lending program authorized by the Act. Competing power companies have no right to enforce the terms of the Act itself; they obviously have no greater rights with respect to the bulletin."

ents recognize that the regulation sets out procedures to be followed in administering the lending program authorized by the Act, and although the regulation clearly contemplates the direct participation of petitioners in those procedures. This viewpoint makes a mockery of the regulation; a tool to be used by the Administrator to secure reasonable proposals from private suppliers, or to be ignored if he really does not wish to reach an agreement, regardless of the reasonableness of the proposals submitted. If respondents' position is correct, it must be concluded that: (1) an administrator's regulation has no binding effect, contrary to this Court's pronouncements in *Vitarelli v. Seaton*, 359 U.S. 535; *Service v. Dulles*, 354 U.S. 363; and *Accardi v. Shaughnessy*, 347 U.S. 260; and that (2) basic fairness is not required in dealings between administrators and the public, contrary to *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964).

The Administrator represented to petitioners that in his negotiations with them he would adhere to his regulation.* In doing so, the Administrator bound himself to negotiate with them for power supply proposals pursuant to the standard of

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*The regulation provides that:

"* * * Where the Administrator finds existing or proposed contracts with private suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. * * *" and that:

"* * * No loan for generation or transmission facilities will be made except * * * upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is * * * (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator. * * *" (Petition, 29, 30, 31).

reasonableness embodied in the regulation. The district court found that the proposals of petitioners which were submitted pursuant to the procedures required by the regulation were reasonable in every respect as to which they could legally contract, and the court below did not conclude otherwise.

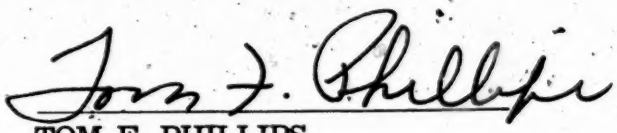
Whether the Administrator's breach of his regulation is subject to judicial review by petitioners is an issue of general importance. None of the authorities cited by the court below or by respondents concerned this issue. *Northern States Power Company v. Rural Electrification Administration*, 248 F. Supp. 616 (D. Minn. 1965), which was cited in support of the petition for a writ of certiorari, is in direct conflict with the decision below. Since the petition was filed, that case was appealed to the United States Court of Appeals for the Eighth Circuit. It is not anticipated that the Eighth Circuit will decide this question prior to the time that this Court would ordinarily consider this petition. Petitioners ask that the possibility of conflict between the decision of the Eighth Circuit and that of the court below on this vital question be considered by this Court, together with all other reasons advanced by petitioners, in acting on their petition.

CONCLUSION

For the reasons set forth in the petition, as amplified herein, the petition for a writ of certiorari should be granted and the judgment of the court below should be reversed.

September 20, 1966

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21 day of September, 1966, I served copies of this reply brief on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 117

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IN THE

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CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY,

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—v.—

RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE, and ORVILLE L. FREEMAN, Secretary of The United States Department of Agriculture,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of October 10, 1966, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case, as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of October 10, 1966, there was no direct conflict of circuit court decisions on the questions presented. There was, however, a conflict between the decision of the court below and that of a district court on the availability of judicial review based on allegations that the Administrator of the R.E.A. failed to comply with the loan procedures contained in REA Bulletin 111-3. (Pet. 29-33). In *Northern States Power Company v. Rural Electrification Administration*, 248 F.Supp. 616 (D. Minn. 1965), the court reviewed the arguments which have been presented by respondents in this case, considered the effect of a violation of the bulletin in light of *Service v. Dulles*, 354 U.S. 363, and *Accardi v. Shaughnessy*, 347 U.S. 260, with which the decision below conflicts in principle, and concluded that "judicial review is available to plaintiffs on the allegation that the R.E.A. has not complied with the procedures contained in Bulletin 111-3 in the granting of the loan to East River." 248 F.Supp. 616, 624.

2. After this petition was filed, *Northern States Power Company v. Rural Electrification Administration*, *supra*, was appealed to the United States Court of Appeals for the Eighth Circuit.* That appeal came after the district court granted a preliminary injunction, notwithstanding the decision of the court below, following the refusal of defendants to produce certain documents for an *in camera* inspection. The appeal of that case to the Eighth Circuit was indicated to this Court in

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*The order giving rise to the appeal is set forth in the appendix hereto.

petitioners' reply brief. It was since learned that the case will be given a preferential hearing on November 14, 1966. While it will soon be known whether that case will give rise to a direct conflict between the circuits regarding judicial review of a violation of REA Bulletin 111-3, the decision of the Eighth Circuit will probably not be rendered prior to the time that this Court would ordinarily act on this petition for rehearing.

3. Whether a violation of REA Bulletin 111-3 merits judicial review is a question of general importance, even if considered apart from the effect of that question as related to other agency regulations. Rural electrification in the United States has been virtually achieved. Increasingly, the R.E.A. will devote its funds to generation and transmission loans, and REA Bulletin 111-3 will play a vital role in the consideration of many such loans throughout the United States. The private power suppliers with which the R.E.A. is required to deal under the bulletin should have the benefit of this Court's pronouncement on whether they have any enforceable rights under the regulation, or whether their bona fide participation in the Bulletin 111-3 procedures may be meaningless. Therefore, the determination by this Court of whether this regulation may be enforced judicially will be just as important to the rest of the country as it now is to petitioners and the people of Louisiana.

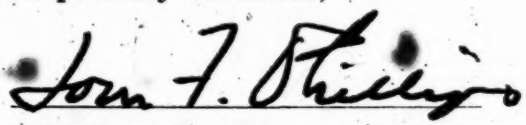
CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is urged that rehearing be granted or, in the alternative, that action on this petition therefor be delayed

pending the anticipated early decision by the Eighth Circuit, and that, upon rehearing, a writ of certiorari be granted.

October 31, 1966.

Respectfully submitted,



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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court, and I further certify that on the 1st day of November, 1966, I served copies of this petition for rehearing on respondents herein by depositing the same in the United States Post Office, with air mail postage prepaid, addressed to the following parties:

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Department of Justice
Washington 25, D. C.

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Assistant Attorney General
Alan S. Rosenthal
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United States Department of Agriculture
and its Secretary, Orville L. Freeman
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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

NORTHERN STATES POWER COMPANY, a corporation, and OTTER TAIL POWER COMPANY, a corporation, Plaintiffs, - Vs - RURAL ELECTRICFICATION ADMINISTRATION; NORMAN M. CLAPP, as Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture; and JOHN DOE and MARY ROE whose true and correct names are unknown to plaintiffs, Defendants.	4-65-Civ-260 MEMORANDUM AND ORDER GRANTING PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION

The above captioned matter came on for hearing on June 21, 1966, pursuant to a motion by plaintiffs for a preliminary injunction to continue until final determination of this action. Messrs. Kenneth W. Green, Joe A. Walters, Cyrus A. Field and Arland D. Brusven appeared for the plaintiffs in support of their motion. Mr. Robert J. Wieferich of the

Department of Justice appeared for defendants in opposition thereto.

Plaintiffs initiated this action on August 12, 1965, asserting several grounds for jurisdiction and venue; 28 USCA 1361, granting district courts original jurisdiction in actions and nature mandamus; 5 USCA 1009, Sec. 10(a) of the Administrative Procedure Act, granting judicial review of administrative action in certain situations; 28 USCA 2201, dealing with declaratory judgments; 26 USCA 1331, granting original jurisdiction to district courts when the matter in controversy exceeds the value of $10,000.00 and arises under the Constitution, laws or treaties of the United States; and 28 USCA 1391, concerning venue in cases where each defendant is an employee or officer of the Federal Government acting in his official capacity.

By their complaint plaintiffs seek to challenge a loan approved by the REA, pursuant to the Rural Electrification Act of 1936, 7 USC 901, et seq, to the East River Electric Power Cooperative, Inc. on May 26, 1965, in the amount of $5,919,000.00. Plaintiffs claim the loan is illegal because consummated in violation of REA Bulletin 111-3, 29 Federal Register No. 40, pages 2765-66, which establishes certain rights in favor of power suppliers such as plaintiffs and imposes certain duties upon the REA and its Administrator. At the commencement of this litigation plaintiffs moved for a preliminary injunction and shortly thereafter defendants moved for a dismissal of this action or, in the alternative, for summary judgment.

On December 31, 1965, this Court entered its Memorandum and Order whereby, among other things, defendants'

Motion for dismissal or for summary judgment and plaintiffs' motion for preliminary injunction were denied. See 248 F. Supp. 616.

A review of the record on file in the office of the Clerk of this Court indicates, among other things:

(a) On January 19, 1966, this Court denied defendants' motion for a dismissal of this action, or in the alternative for a modification of this Court's Order of December 31, 1965, and directed that all parties may proceed to take depositions and pursue discovery proceedings in accordance with the Federal Rules of Civil Procedure;

(b) On January 19, 1966, plaintiffs moved this Court for an Order requiring defendants to produce certain documents in their possession, and permit plaintiffs to inspect and copy the same preliminary to the taking of certain depositions (which depositions were also noticed on January 19, 1966, for oral examination on February 22, 1966) by oral examination of defendants and certain of their employees and agents at a time shortly after plaintiffs had an opportunity to inspect and copy said documents;

(c) On January 25, 1966, defendants served their answer to plaintiffs' complaint;

(d) On January 28, 1966, plaintiffs filed a Notice of Trial of this litigation to be tried as a court case at the general term of this Court commencing March 1, 1966;

(e) On February 15, 1966, defendants opposed plaintiffs' motion as to certain documentation on the grounds of failure of good cause being shown and said documentation being irrelevant and immaterial;

(f) By Order dated February 15, 1966, this Court granted plaintiffs' motion for the production, inspection and copying of certain documents with inspection to commence in Washington, D. C. on March 7, 1966;

(g) On March 2, 1966, defendants moved this Court for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure based upon claims of privilege;[1]

(h) On April 5, 1966, defendants presented to this Court a copy of a report dated February 10, 1966, of the Comptroller General of the United States of "Examination into Alternative Transmission Plans Considered Prior to Approval of a Loan to East River Electric Power Cooperative, Inc.";

(i) On May 5, 1966, trials of non-jury cases were commenced that had been regularly placed upon the spring general term calendar of this Court and the trials of said non-jury cases as well as jury cases placed upon said general term calendar are substantially completed;

(j) On May 12, 1966, this Court ruled on defendants' motion for a protective order and in essence withheld final determination of defendants' claims of privilege pending an *in camera* inspection by this Court of the documentation in question; defendants were granted fifteen days to produce the documents for *in camera* inspection;

(k) On May 20, 1966, defendants, without requesting a stay of this Court's order for *in camera* inspection,

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[1] Defendants' claims of privilege relate to two groups of documents, the first of which generally consist of memorandum, letters, reports, and other communications between and among various employees and officials within the Department of Agriculture and the Rural Electrification Administration; the second group of documents consist almost entirely of communications between the Government and the East River Electric Power Cooperative, Inc and further intra-governmental communications.

noticed a further motion returnable on June 13, 1966, to modify the previous order of this Court for *in camera* inspection by adding language which would in substance require this Court to return the documents which would be produced by defendants for *in camera* inspection directly to the defendants prior to this Court's ruling thereon;

(l) At the hearing on June 13, 1966, this Court denied defendant's motion to modify its previous Order requiring *in camera* inspection;

(m) On June 16, 1966, defendants filed with this Court a formal written statement declining to produce the withheld documents for *in camera* inspection.

As this Court reads the complaint which initiated this action and various affidavits filed in support of plaintiffs' position, the plaintiffs assert no right to challenge the authority of the REA to grant loans or for that matter to grant the loan in question. Rather, plaintiffs claim REA Bulletin 111-3 is a duly promulgated regulation having the force and effect of law and binding upon the REA and the Administrator and that a loan approved without adherence to it invades the plaintiffs' rights and entitles them to judicial review of the agency action.

This Court previously concluded that judicial review is available to plaintiffs on the allegation that the REA has not complied with the procedures contained in its Bulletin 111-3. Plaintiffs contend that the documentation withheld by defendants reflects the procedures followed in the determination to grant the loan to East River Electric Power Cooperative, Inc. and that such procedures did not follow the legal requirements for granting such a loan. No alternate sources of the

information which plaintiffs seek has been suggested to this Court by the defendants and this Court finds that the kind of information contained in the documentation to which defendants have asserted a claim of privilege is not otherwise available to the plaintiffs.

In this posture of the litigation the Court believes that the documentation withheld by the defendants from this Court's *in camera* inspection preliminary to a ruling on the adequacy of claims of privilege may, and upon inspection by this Court it may not, be absolutely essential to be produced for inspection if the litigants are to secure a just determination of their respective claims. The thwarting of a determination by this Court of claims of privilege of such documentation will necessarily result in delays in preparation for trial and the trial of the action itself.

At the time of this Court's Order of December 31, 1965, denying defendants' motion to dismiss, it was contemplated that this litigation would quickly move forward by way of discovery proceedings so as to permit an adjudication on the merits at the spring 1966 general term of this Court which is now practically concluded. The Court finds that plaintiffs and their counsel have been diligent in attempting to bring this litigation to a final conclusion. Plaintiffs promptly placed this case on the general term calendar commencing March 1, 1966 and immediately proceeded to invoke discovery proceedings under the Federal Rules of Civil Procedure as an aid to preparation for trial. It is apparent that defendants' refusal to produce the documentation in question for this Court's *in camera* inspection preliminary to a ruling on claims of privilege is going to prevent this litigation soon being brought on for trial or, if brought on for trial, a determination of

the issues without considerable delays occasioned by requests and refusals over documentation which in and of itself may be determinative of the issues presented to this Court for final determination.

This Court expressed the opinion, at the time of its Order of December 31, 1965, that plaintiffs at this stage of the proceedings had not demonstrated sufficient likelihood of success on the merits so as to justify preliminary injunctive relief. Further, anticipating early trial no showing of irreparable harm was manifest. Defendants' conduct has made an early trial impossible. Such conduct will frustrate a just determination of this litigation and its final disposition from this Court's calendar.

This Court finds that the intentional and wilful refusal of the defendants to produce the documents in question for an *in camera* inspection preliminary to a ruling on claims of privilege indicates that the documents would prove, or help to prove, the basic and essential facts supporting plaintiffs' claim for relief as alleged in their complaint. Such a finding is supported by the report dated February 10, 1966, of the Comptroller General of the United States in which the Comptroller General stated as an overall conclusion:

> "On the basis of our review of the cost and feasibility of the straight-wheeling, joint, and independent transmission plans considered by REA prior to its approval of the independent plan, we believe that, solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments over a longer period of time and estimated savings of $130,000 in costs of operation during a 10-year period—adoption of the joint plan would have resulted in greater economies

to East River than would the adoption of the independent plan. In addition, REA considered the joint plan to offer a more reliable system than the independent plan offered.

"We note that, in approving the independent plan, REA cited certain possibilities for achieving economies under this plan which might offset the foreseeable benefits of the joint plan. The Administrator stated that, while no one of the factors, as discussed in this report, when considered separately, might have resulted in the approval of the independent plan, the combination of these factors would justify approval of the independent plan.

"We believe that REA did not fully explore the possibilities discussed in this report in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected REA's decision to approve the independent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize."

At this stage of the proceedings and based upon the entire record now before me, including affidavits on file and the Comptroller General's Report submitted by the defendants, this Court finds and concludes that there has been a prima facie showing of non-compliance with the applicable regulations; that the defendants' conduct lends further support to this finding and conclusion. Upon the entire record the Court accordingly finds and concludes that there is sufficient factual showing and sufficient likelihood of success by the plaintiffs on the merits so as to justify preliminary injunctive relief; that the maintenance of a status quo pending final disposition of this litigation is necessary so as not to render

the substantive issues moot; that plaintiffs will suffer irreparable harm by the delays that have now become apparent and that without injunctive relief plaintiffs may be deprived of their justicible rights before a final determination on the merits. Accordingly, the requisite factual showing for preliminary injunctive relief, as prayed for in plaintiffs' motion, is now apparent.

Independently of the foregoing, the facts which have been designated as established for purposes of this case by separate Order of this Court relating to sanctions under Rule 37 would alone require temporary injunctive relief.

Therefore, it is:

ORDERED, That plaintiffs' motion for a preliminary injunction in the above captioned action to continue until the final determination thereof be, and it hereby is, granted;

ORDERED FURTHER, That, pending further Order of this Court, the above named defendants, and each of them, and all other persons who are or may be under the control of them, or either of them, and all persons to whom knowledge of such injunction shall come be, and they hereby are, restrained and enjoined from (i) consummating or participating in consummation of that certain loan to East River Electric Power Cooperative, Inc. in the amount of $5,919,000.00 under the provisions of the Rural Electrification Act of 1936, as amended, and (ii) distributing, expanding or using any of the proceeds of the said loan approved by the Rural Electrification Administration on or about May 26, 1965, pursuant to an application by East River Electric Power Cooperative, Inc. filed on or about May 26, 1964.

ORDERED FURTHER, That the injunction bond of the plaintiffs in the amount of $1,000.00 approved as to form and surety by Order of this Court dated June 21, 1966, and filed in the office of the Clerk of the above named Court on June 22, 1966, stand as the bond relating to this injunction.

IT IS SO ORDERED.

s/ EDWARD J. DEVITT

Edward J. Devitt, Chief Judge

Dated at Minneapolis, Minnesota
this 27th day of June, 1966.